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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 11

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

MANUFACTURERS TRUST COMPANY

No. 15

MANUFACTURERS TRUST COMPANY, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER IN NO. 11 AND FOR THE RESPONDENT IN NO. 15

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit (R. 17-24) is reported at 169 F. 2d 932. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 5, 1948 (R. 24). Cross-petitions for writ of certiorari were filed by the Solicitor General, on behalf of the Alien Property Custodian,[1] on October 29, 1948, and by Manufacturers Trust Company[2] on December 2, 1948. Both petitions were denied on January 17, 1949. The Solicitor General, on behalf of the Custodian, filed a petition for rehearing on June 16, 1949. In a memorandum filed June 22, 1949, the Bank asked that, if the Government's petition for certiorari. On June 27, 1949, both petitions for rehearing should be granted, rehearing be granted also of the denial of the Bank 's petition for writ of rehearing were granted, the orders denying certiorari were vacated, and certiorari was granted in both cases.

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

Section 7(c) of the Trading With the Enemy Act provides that if the President shall "so require any money * * * owing * * * to * * * an

[1] By Executive Order No. 9788 (October 15, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

[2] Manufacturers Trust Company will sometimes be referred to in this brief as "the Bank."

enemy * * * which the President after investigation shall determine is so owing * * * shall be * * * paid over to the Alien Property Custodian * * *." The Custodian, to whom the President's powers thereunder have been delegated, has after investigation determined that a bank is indebted to an enemy in a stated amount, has demanded payment to himself of that amount, and has instituted suit to enforce his demand. The Bank's refusal to comply with the demand is based on its assertion of a right of setoff against the enemy creditor. The following questions are presented:

1. Whether, in a summary proceeding to enforce the Custodian's demand for payment of a debt found to be owing to an enemy, the debtor may put in issue the correctness of the Custodian's findings by denying the existence of the debt.

2. Whether the rights conferred by Section 8(a) of the Act on holders of certain types of security interests may be asserted in such a summary proceeding, and, if so, whether the interest here claimed comes within the scope of that section.

3. Whether the District Court properly allowed interest on the sum demanded from the date of service of the demand.

STATUTES INVOLVED

The relevant provisions of the Trading With the Enemy Act, as amended, are set forth in the Appendix, *infra*, pp. 44-47.

STATEMENT

On October 31, 1941, Manufacturers Trust Company reported to the Treasury Department that, as of June 14, 1941, the Deutsche Reichsbank had a total credit of $39,589.00 (R. 5).[3] The Bank further reported that the Reichsbank was not indebted to it in any amount on either June 1, 1940, or June 14, 1941, and that there were no adverse claims asserted against or with respect to the indebtedness in question (R. 6).

By Vesting Order No. 5791, dated February 1, 1946 (11 F. R. 3005), the Custodian, having determined that the Deutsche Reichsbank was a national of an enemy country and that "that certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company" was "property within the United States * * * payable or deliverable to" the Reichsbank, vested such property in himself (R. 7-8). On January 30, 1947 the Custodian issued a turnover directive in which he found the amount of the debt to be $25,581.49, that there were no valid offsets or counterclaims, and that the sum of $25,581.49 was property in the possession of or under the control of the respond-

[3] By Treasury Department Regulation, dated June 14, 1941, as amended September 18, 1941 (6 F. R. 2905, 4818), issued pursuant to Section 5(b) of the Trading With the Enemy Act as amended by the Joint Resolution of May 7, 1940 (54 Stat. 179, 50 U.S.C. App. § 5(b)), reports were required to be made to the Treasury Department of all property subject to the jurisdiction of the United States on June 1, 1940, and June 14, 1941, in which on the respective dates any foreign country or national thereof had an interest. 31 C.F.R. (Cum. Supp. 1943) § 130.4.

ent which was vested in the Custodian by Vesting Order No. 5791.[4] He accordingly directed the Bank to turn over that amount (R. 9-11). The Bank refused to comply, and on October 29, 1947, the Custodian instituted this proceeding to enforce compliance with his demand (R. 2-4). On December 12, 1947, the District Court for the Southern District of New York (Coxe, J.) directed the Bank to pay over the sum demanded, together with interest at the rate of 6% from the date of service of the turnover directive (R. 15). On appeal by the Bank the Court of Appeals for the Second Circuit unanimously affirmed the order of the District Court insofar as it directed compliance with the turnover directive, but a majority of the Court (Swan and Frank, JJ.) held that the Custodian was entitled to interest only from the date on which the District Court entered its order (R. 17-24).

In No. 11 the Government has petitioned to review the decision of the Court of Appeals insofar as it reversed the decision of the District Court and denied the Custodian's claim to interest. In No. 15 the Bank has petitioned to review the decision of the Court of Appeals insofar as it affirmed the decision of the District Court and directed immediate payment to the Custodian of the principal sum demanded.

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[4] This determination was made notwithstanding previous receipt by the Custodian of a letter from the Bank asserting that the sum in question was offset by obligations of the enemy to the Bank (R. 9).

SUMMARY OF ARGUMENT

In this action the Custodian seeks summary enforcement of his demand for payment of a debt determined to be owed to an enemy. The Bank's contention that it may resist payment by denying existence of the debt is founded upon a misconception of the summary nature of this proceeding. Section 7(c) of the Act specifically provides that "any money * * * owing * * * to * * * an enemy * * *, which the President after investigation shall determine is so owing * * * shall be * * * paid over to the Alien Property Custodian * * *." Similar authority is contained in Section 5(b) of the Act which allows the vesting of "any property or interest" of an enemy; and the pertinent Treasury Department Regulations define "property," as there used, to include "bank deposits" and "any debts, indebtedness or obligations." No reasonable distinction can be drawn between the right of summary capture as to property owned by an enemy (which the Bank concedes) and the right of summary capture of money owed to an enemy (which the Bank denies). The necessity for the Custodian to be free of the burden of vexatious litigation is the same in both cases, and the hardship upon the person compelled to pay is no greater in one instance than in the other. Both classes of persons may test the correctness of the Custodian's determination of enemy interest, and hence of his right to retain the property seized, by subsequent judicial proceedings instituted pursuant to Section 9(a) of the Act.

Similarly without foundation is the Bank's argument that its claim of a "banker's lien," if established, would exempt the debt from seizure under Section 8(a) of the Act. The legislative and judicial history of Section 8(a) of the Act show that it was not intended to exempt any security holders from the Custodian's power of summary seizure, but simply to preclude any interpretation of the Act which would result in the permanent destruction of their possessory rights. In any event, however, there cannot in this case be a possessory lien of the type referred to in Section 8(a) since, upon deposit of the funds with the Bank, title passed to it and a simple debtor-creditor relationship arose between it and the enemy creditor. It is manifest that the Bank cannot have a lien "in the nature of security" against its own property.

Since the Custodian was entitled to immediate possession of the money, fairness and the efficient administration of the Trading With the Enemy Act required that he be allowed a reasonable rate of interest as damages for the unwarranted detention. On like grounds this Court has frequently held that interest is awardable on obligations owing to the Government despite the lack of any statutory provision for interest. The obligation to pay was created, in substantial part, for the financial advantage of the Government, and the Government is entitled to compensation for an unlawful withholding. To deny interest in such circumstances would make it profitable to delay payment to the Custodian as long as possible and would thus en-

courage the flouting of a statutory procedure designed to ensure the speedy reduction to possession of enemy property.

ARGUMENT

I

AN ACTION BY THE CUSTODIAN, TO ENFORCE HIS DEMAND FOR POSSESSION OF VESTED PROPERTY, IS SUMMARY AND MAY NOT BE DELAYED BY LITIGATION OF ADVERSE CLAIMS TO SUCH PROPERTY

In the administration of the Trading With the Enemy Act no principle is better settled than that the Custodian may proceed summarily to reduce to possession property which he determines to be enemy-owned. "War brooks no delay." *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 477. From the outset the courts have pointed out that the Custodian could seize by force; that "the statute creating the Custodian enables him to capture enemy property with a sergeant and file, or otherwise *vi et armis*." *American Exchange National Bank* v. *Garvan*, 273 Fed. 43, 48 (C.A. 2), affirmed 260 U. S. 706. In practice, he follows, as he did here, the more moderate course of issuing a formal demand [5] and then proceeding, where necessary, in a

[5] His demand may be cast in the form of a so-called *res* vesting order in which the Custodian determines that a described *res* is enemy property and demands the delivery of that *res* to him. See, e.g., *The Antoinetta*, 49 F. Supp. 148, 150-151 (E.D. Pa.), affirmed, 153 F. 2d 138 (C.A. 3), certiorari denied, 328 U. S. 863. Or, as here, he may, after having vested the interests of a named enemy in certain property, issue a turnover directive defining that interest and demanding its pay-

federal or state court to enforce compliance.[5] But it is settled that in such a summary proceeding the Custodian's determinations are conclusive and no questions as to the ultimate right of the Custodian to retain the property can be presented.

In the first case which came to this Court under the Trading With the Enemy Act, Mr. Justice Holmes emphatically rejected the contention that the reduction to possession of property which had been determined to be enemy-owned could be delayed by litigation as to its actual enemy status, stating that "it cannot be supposed that a resort to the Courts is to be less immediately effective than a taking with the strong hand." *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 568. The same contention was made and rejected in *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, where

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ment to him. See, e.g., *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N.Y.S. 2d 289; *Matter of Daly*, 189 Misc. 680, 74 N.Y.S. 2d 711.

In many cases, the Custodian finds it unnecessary to avail himself of his summary powers and is content simply to issue an order vesting the right, title and interest of an enemy and to permit an adjudication of the scope of that right, title and interest prior to reduction of the property to possession. For explanation of the distinction between a *res* vesting order and a right, title and interest order, see *Clark* v. *Edmunds*, 73 F. Supp. 390 (W.D. Va.). That the Custodian does not always find it necessary to exercise his summary powers does not, of course, detract from their availability to him when needed.

[5] Suit in federal court is authorized by Section 17 of the Act. Cf. *Markham* v. *Allen*, 326 U. S. 490. Where, however, the property is in course of administration by a state court, the Custodian frequently applies to that court for enforcement of his demand. E.g., *Matter of Viscomi*, 270 App. Div. 732, 60 N.Y.S. 2d 897.

Mr. Justice McKenna pointed out that "the determination of the Custodian is conclusive whether right or wrong" (p. 53) and characterized the suit as "tantamount to physical seizure" (p. 55). And these principles have been consistently applied since, both as to seizures under Section 7(c) of the Act and as to vestings under Section 5(b).[7]

These principles were solidly founded on the plain, unambiguous language of the statute. That language deals in exactly the same manner with property which the Custodian determines to be owing to an enemy as with property determined to be owned by an enemy.

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[7] See, *e.g.*, under Section 7(c):

Stoehr v. *Wallace*, 255 U. S. 239; *American Exchange National Bank* v. *Garvan*, 273 Fed. 43 (C.A. 2), affirmed, 260 U. S. 706; *In re Miller*, 281 Fed. 764 (C.A. 2), appeal dismissed, 262 U. S. 760; *Miller* v. *Kaliwerke Aschersleben A. G.*, 283 Fed. 746 (C.A. 2); *Application of Miller*, 288 Fed. 760 (C.A. 2); *Columbia Brewing Co.* v. *Miller*, 281 Fed. 289 (C.A. 5); *Camp* v. *Miller*, 286 Fed. 525 (C.A. 5); *Hicks* v. *Baltimore & O. R. Co.*, 10 F. 2d 606 (D. Md.), aff'd *sub nom. Baltimore & O. R. Co.* v. *Sutherland*, 18 F. 2d 560 (C.A. 4); *In re Sutherland*, 23 F. 2d 595 (C.A. 2); *Kohn* v. *Jacob & Josef Kohn*, 264 Fed. 253 (S.D.N.Y.); *Miller* v. *Rouse*, 276 Fed. 715 (S.D.N.Y.); *Miller* v. *Lautenberg*, 239 N.Y. 132, 145 N.E. 907; *Matter of Sielcken*, 167 Misc. 327, 3 N.Y.S. 2d 793.

Under Section 5(b):

Silesian-American Corporation v. *Markham*, 156 F. 2d 793 (C.A. 2), affirmed *sub nom. Silesian-American Corporation* v. *Clark*, 332 U. S. 469; *The Antoinetta*, 49 F. Supp. 148, 150-151 (E.D. Pa.), affirmed, 153 F. 2d 138 (C.A. 3), certiorari denied, 328 U. S. 863; *Clark* v. *E. J. Lavino & Co.*, 72 F. Supp. 497 (E.D. Pa.), modified in another connection, C.A. 3 (unreported, decided June 1, 1949; for decision see motion, *Clark* v. *Manufacturers Trust Co.*, App., pp. 7-14); *Matter of Viscomi*, 270 App. Div. 732, 60 N.Y.S. 2d 897; *Stern* v. *Newton*, 180 Misc. 241, 39 N.Y.S. 2d 593; *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N.Y.S. 2d 289; *Matter of Daly*, 189 Misc. 680, 74 N.Y.S. 2d 711.

Section 7(c) of the Act (40 Stat. 416, as amended, 50 U.S.C. App. § 7(c)) provides, in pertinent part, that:

> If the President shall so require any money or other property * * * *owing or belonging to* or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy * * * *which the President after investigation shall determine is so owing or so belongs or is so held,* shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian * * *. [Italics added.][8]

By this section the Custodian is given the authority to seize property which he determines to be owing to or owned by an enemy. Its categorical language affords no possible basis for a distinction between the two types of enemy property. To sustain such a distinction would require, in effect, that the words "so owing" in the italicized phrase be transposed so as to make the phrase read "which is so owing or which the President after investigation shall determine so belongs or is so held." Neither the legislative history of the provision nor its evident purpose furnishes any excuse for such drastic textual surgery.

Even as Section 7(c) imposes no limitation upon the Custodian's power to vest and summarily re-

[8] The powers conferred on the President by this section have been delegated to the Attorney General, as successor to the Alien Property Custodian. Executive Orders Nos. 6694, dated May 1, 1934; 8136, dated May 15, 1939 (4 F.R. 2044); 9142, dated April 21, 1942 (7 F.R. 2985); 9788, dated October 14, 1946 (11 F.R. 11981).

duce to possession "any property" owned by or owing to an enemy, the language of Section 5(b) of the Act is similarly broad, allowing the vesting of "any property or interest" of a foreign country or national thereof. For purposes of that section "property" includes "bank deposits" and "any debts, indebtedness or obligations." 8 C.F.R. (1949) § 511.1(c).[9]

Accordingly, it has been held by those courts which have been confronted with the problem that the Custodian's determination of indebtedness to an enemy may not be questioned in a summary proceeding to enforce his demand for the amount which he has determined to be owing. *Camp* v. *Miller*, 286 Fed. 525 (C.A. 5); *Clark* v. *E. J. Lavino & Co.*, 72 F. Supp. 497 (E.D. Pa.), modified in another connection, C.A. 3 (unreported, decided June 1, 1949; for decision, see motion, *Clark* v. *Manufacturers Trust Co.*, App., pp. 7-14); *Miller* v. *Rouse*, 276 Fed. 715 (S.D.N.Y.); *Clark* v. *Central Savings Bank*, (S.D.N.Y., Civil No. 43-753, unreported). But see *Simon* v. *Miller*, 298 Fed. 520, 522-524 (S.D.N.Y.)[10] In *Clark* v. *E. J. Lavino & Co.*,

[9] This definition has received implicit legislative ratification. Joint Resolution of May 7, 1940, c. 185, § 1, 54 Stat. 179; First War Powers Act of 1941, c. 593, Title III, § 301, 55 Stat. 839. See also 86 Cong. Rec. 5170, April 29, 1940, where Senator Danaher read into the Congressional Record the then existing Treasury Department Regulations defining "property" in language identical to that quoted above.

[10] *Simon* v. *Miller* was a suit under section 9(a) for recovery of vested property of which the Custodian had already obtained possession. Accordingly, it constitutes no precedent as to the conclusiveness of the Custodian's determinations for purposes of a summary proceeding to enforce his demand.

supra, the court held (72 F. Supp. at p. 499), that the person whom the Custodian has found to be indebted:

> * * * may not, in the present proceeding, question the Alien Property Custodian's determination [as to the indebtedness]. If a mistake has been made by the Alien Property Custodian in his determination, respondent is not without a remedy. Section 9 of the Trading With the Enemy Act * * * provides a procedure for the recovery of property which has been erroneously seized * * *.

And in *Miller* v. *Rouse*, *supra*, Judge Learned Hand said (276 Fed. at 716):

> The respondents object that this debt * * * was an unexecuted gift. Perhaps so, but the Custodian has determined that it was a debt, and his determination is conclusive * * * this proceeding is merely to enforce the capture so made.

The Bank, however, continues to assert that the Custodian's statutory power of summary capture is inapplicable to a case in which the asserted debtor denies the existence or amount of the indebtedness. It insists that to give conclusive effect

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In one other case (*Clark* v. *Nii* (D. Haw., Civil No. 837 (unreported), Nov. 19, 1948) a court has held that the Custodian could not summarily collect a debt whose existence the respondent denied. However, that issue was rendered moot when the same court, on January 26, 1949, determined that the vested property, the use of which had given rise to the alleged debt, was owned by an enemy rather than by the respondent, dismissed a pending Section 9(a) suit for return of such property, and ordered payment of the debt to the Custodian.

to the executive determination in such a case would permit the Custodian to create property. And the court below, relying on *Simon* v. *Miller, supra,* indicated that it would "hesitate" to give effect to the Custodian's determination in such a case. (R. 21). It apparently recognized that these dicta were inconsistent with the holdings in *Camp* v. *Miller* and *Clark* v. *E. J. Lavino & Co., supra* (R. 20-21). *Miller* v. *Rouse, supra,* it did not cite or discuss.

The court below held, however, that the present case presents no such question, since the Bank does not deny the existence of the debt, but merely asserts a setoff. More fundamental, the Bank has not suggested that it does not have the sum of $25,581.49. The Custodian has thus done no more than to demand payment of a sum of money which the Bank holds and which he has found to be enemy property because owing to an enemy. There is no attempt to "call property into existence for purposes of seizure." (R. 21).[11] If the Custodian had found that the Bank held that sum as trustee

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[11] The Court of Appeals for the Second Circuit has held that, in a suit by the Custodian to obtain possession of enemy property, the respondent would not be heard to argue that the property demanded (shares of stock) did not in fact exist, because issued for an illegal consideration. *In re Sutherland,* 23 F. 2d 595 (C.A. 2). The court said (23 F. 2d at p. 598):

> "The determination of the Alien Property Custodian had sufficient finality to require the [respondent] to issue stock to the Custodian * * *. Whether the decision of the Custodian was right or wrong was immaterial to the requirement for such transfer."

for or as agent of an enemy, the Bank could not be heard to contend that the money was in fact its own property. *Central Union Trust Company* v. *Garvan, supra; Commercial Trust Company* v. *Miller, supra; Farmers' Loan & Trust Co.* v. *Hicks*, 9 F.2d 848 (C.A. 2), certiorari denied, 269 U. S. 583. We perceive no reason for a different result where the Custodian's finding that the money is enemy property is based on a finding of a debtor-creditor relationship. In either case, the property—a sum of money—is in existence, and the question is who is entitled to it. On that question we think there can be no doubt of the conclusiveness of the Custodian's determination.

In any event, however, there is no warrant in the statute for the assertion that some kinds of determination by the Custodian are conclusive and others not. The grant of authority to make a determination, which will be conclusive for purposes of summary reduction to possession, that money "is so owing" to an enemy necessarily includes the power to determine not only the identity of the creditor but also the existence and amount of the indebtedness.

It is true that in the supposed case of a debtor who, in fact, has not the cash demanded, severe hardship might result from summary enforcement of a turnover directive. The possibility of such hardship would unquestionably be taken into account by the Custodian in considering whether resort to summary proceedings was appropriate.

But, in any event, it should be remembered that the imperative necessities involved in the exercise of a war power such as that of summary seizure necessarily admit of some hardship. In the case of mistaken seizure of any property, the property is returned without compensation for loss of use, loss of an advantageous bargain, decline in value, or other losses arising from withholding of possession for a time.[12] Moreover, the owner is put to the burden of instituting suit and to the risk that, if he is not diligent in doing so, the property may be sold by the Custodian and recovery be restricted to the proceeds of sale.[13] In authorizing such summary proceedings, Congress undoubtedly was aware of these possible hardships, but felt them to be more than counterbalanced by the danger that a denial of the right of summary capture would subject the speedy reduction to possession of enemy property to intolerable delays of litigation.[14] As Judge Learned Hand has eloquently declared:

> The power of the United States peremptorily to reduce to its possession and apply to its use,

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[12] In a wide variety of cases the federal courts have consistently held that losses incident to erroneous seizure are not compensable under Section 9(a) of the Trading With the Enemy Act or otherwise. *Sigg-Fehr* v. *White*, 285 Fed. 949, 952 (C.A. D.C.); *Pflueger* v. *United States*, 121 F. 2d 732 (C.A. D.C.). Cf., *Escher* v. *United States*, 68 C. Cls. 473; *Rodiek* v. *United States*, 100 C. Cls. 267.

[13] Cf., *Sielcken-Schwartz* v. *American Factors*, 60 F. 2d 43 (C.A. 2), certiorari denied, 287 U.S. 654.

[14] A like recognition of the necessity of speedy action even at the risk of hardship is apparent in other wartime statutes. See, e.g., *Yakus* v. *United States*, 321 U.S. 414, 442-443, and cases cited.

> at moments critical in its history, all property which lies within its power is not to be emasculated by the delays of private litigation; the peril may be overwhelming, the need imperative. It is enough that reparation will be available, where reparation is due; meanwhile the individual must comply with the immediate demand just as he must comply with the immensely more grievous demand for the possible sacrifice of life and limb, when that too is called for. [*Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 798 (C.A. 2), affirmed, 332 U. S. 469.]

This case presents a striking example of the insubstantiality of the claims which may be asserted as defenses to the Custodian's demands for the surrender of assets or payment of money. The Bank here relied on a claimed right to setoff. To establish such a right of setoff it is necessary to show mutual, matured obligations between the same parties acting in the same capacities. *Scammon* v. *Kimball*, 92 U. S. 362, 367; 7 *Zollmann, Banks and Banking* (Perm. Ed.) § 4392. But, to support that claim the Bank pleaded only the following (R. 14):

> The indebtedness of the Deutsche Reichsbank arose from the fact that Deutsche Reichsbank was upon information and belief, an instrumentality and part of the German Government. The German Government guaranteed to Manufacturers Trust Company the payment of debts of various German banks to Manufacturers Trust Company. On June 1st, 1940

and June 14th, 1941, the indebtedness of the said banks to Manufacturers Trust Company, was in excess of $25,581.49.[15]

The foregoing assertions directly contradict the Bank's previous sworn declaration of October 31, 1941, to the Treasury Department that the Reichsbank was not indebted to it on either of those dates, while admitting its own indebtedness to the Reichsbank arising by virtue of a deposit account (R. 5-6). And their tenuous nature is readily apparent. Thus, the assertion that the German Government and the Reichsbank were one and the same, so that obligations of the German Government became automatically obligations of the Reichsbank, is made on information and belief only, without any supporting allegations setting out the basis of that belief.[16] Moreover, the Bank's claim against the German Government is only as an alleged guarantor

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[15] In his concurring opinion, Judge Frank found these allegations totally inadequate to support a claim of setoff (R. 24).

[16] The most reliable authority supports the view that the Deutsche Reichsbank was a corporate entity distinct from the German Government, which was not even a stockholder in the bank, although it took profits in excess of a specified amount. See *Military Government Handbook, Germany*, § 5: Money and Banking (Army Service Forces Manual M356-5, March 1945), pp. 66-68. The mere existence of general governmental control over the Reichsbank of course falls far short of establishing sufficient identity for purposes of setoff. *United States* v. *Strang*, 254 U.S. 491; *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U.S. 549; *Coale* v. *Societe Co-op Suisse des Charbons*, 21 F. 2d 180 (S.D.N.Y.); *United States* v. *Deutsche Kalisyndikat Gesellschaft*, 31 F. 2d 199 (S.D.N.Y.); *Amtorg Trading Corporation* v. *United States*, 71 F. 2d 524 (Ct. Cust. & Pat. App.).

of the debts of various other German banks (R. 14). "It is generally held that in the absence of a contract a bank has no right, without a depositor's consent, to apply his deposit to the payment of an obligation for which he is liable as a guarantor, indorser, or surety." 5 Michie, *Banks and Banking* (Perm. Ed.) § 128.[17]

Finally it should be noted that the absence of a federal license under the "freezing" regulations imposed pursuant to Section 5(b) of the Trading With the Enemy Act and Executive Order No. 8389, as amended, 5 F.R. 1400, would be a complete bar to the assertion of any right of setoff which did not exist prior to June 14, 1941, the date on which those regulations became applicable to German property. Executive Order No. 8785, 6 F.R. 2897.[18] The Bank has not alleged that the indebtedness of the German Government which is sought to be set-

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[17] See e.g., *First National Bank of Kansas City, Mo.* v. *Seldomridge*, 271 Fed. 561, 565 (C.A. 8); *Lamb* v. *Morris*, 118 Ind. 179, 20 N.E. 746; *Long Island Bank* v. *Townsend*, Hill & D. Supp. 204 (N.Y.); *Moore* v. *Greenville Banking etc., Co.*, 173 N.C. 180, 91 S.E. 793; *Wills* v. *Citizens Nat. Bank*, 125 N.J.L. 546, 16 A. 2d 804; 1 Morse, *Banks and Banking* (Perm. Ed.) § 334 (p. 777, fn. 2); 7 Zollmann, *Banks and Banking* (Perm. Ed.) § 4590. An exception to this principle may arise in case the insolvency of the party primarily liable is established (Michie, *supra*; Zollmann, *supra*); but in this case, Manufacturers Trust Company has not even asserted the insolvency of the German banks primarily liable.

[18] Plainly the exercise of a right of setoff to extinguish the indebtedness to the Reichsbank would be a "transfer of credit" prohibited by Section 1A of the Order and a dealing in evidences of indebtedness prohibited by Section 1E. Cf. *Propper* v. *Clark*, 337 U. S. 472. See also Treasury Department General Ruling No. 12, 7 F. R. 2991.

off matured prior to that date.[19] Nor has it asserted that the right of setoff had been claimed or otherwise exercised prior to that date.[20] Indeed, the Bank's sworn declaration to the Treasury Department, made in October 1941, that there was no indebtedness of the Reichsbank to it on June 14, 1941 (R. 6), would seem an insurmountable obstacle to the establishment by the Bank of any claim that the right of setoff had been claimed or exercised prior to the effective date of the freezing regulations.

Despite the insubstantiality of its claim, the Bank has nevertheless succeeded in delaying, for more than two and a half years[21] from the date of the Custodian's turnover directive, the payment to the Custodian of the sum demanded. Such delays will be multiplied many times if the Custodian's summary powers are not sustained. The asserted hardship imposed upon the Bank by compliance with the Custodian's demand falls far short of being of sufficient gravity to warrant such interference with the speedy exercise of an important wartime power.

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[19] Maturity is an essential prerequisite to the existence of a right of setoff. *Durkee* v. *National Bank*, 102 Fed. 845 (C.A. 5); *Wright* v. *Seaboard Steel & Manganese Corp.*, 272 Fed. 807 (C.A. 2); *Irish* v. *Citizens' Trust Co.*, 163 Fed. 880 (N.D.N.Y.); *Lebanon Iron Co.* v. *Donnelly & Co.*, 29 F. 2d 411 (E.D. Pa.).

[20] Setoff is not an automatic remedy. *Thomas* v. *Matthiessen*, 232 U. S. 221, 236; 5 Michie, *Banks and Banking* (Perm. Ed.) § 123; 7 Zollmann, *Banks and Banking* (Perm. Ed.) §§ 4392 (p. 8), 4563; cf. *Zimmerman* v. *Hicks*, 7 F. 2d 443, 446 (C.A. 2).

[21] The sum was paid on August 24, 1948.

After compliance with the Custodian's demand for payment, the Bank's remedy is clear under Section 9(a) or Section 32 of the Trading With the Enemy Act. *Camp* v. *Miller, supra.* If the $25,581.49 is in fact not owing to the enemy, the Bank has an "interest, right or title" in the vested property which can be established and recovered in proceedings under either of those sections. Thus, at most the Bank will, if the Custodian's findings should prove erroneous, have been inconvenienced by the temporary loss of possession of the sum demanded. Comparable or more serious claims of hardship have been made and rejected in every case in which the Custodian's summary powers have been sustained. And, indeed, all such claims pale into insignificance when contrasted with the situation of an individual compelled to "comply with the immensely more grievous demand for the possible sacrifice of life and limb." *Silesian-American Corporation* v. *Markham, supra.*

II

SECTION 8(a) OF THE ACT AFFORDS THE BANK NO DEFENSE TO THE PRESENT PROCEEDINGS

A. *The Rights Conferred by Section 8(a) May Not be Asserted in a Summary Proceeding to Enforce the Custodian's Demand*

We have pointed out in the preceding section of this brief that the Trading With the Enemy Act confers upon the Custodian the power summarily to reduce to possession property which is determined to be owned by or owing to an enemy, that

for purposes of such a summary proceeding the administrative determinations are conclusive, and that ample remedies are afforded for a subsequent challenge of those determinations. The Bank asserts, however, that Section 8(a) of the Act creates an exception to this scheme. We believe that examination of the text and legislative history of that section will show that it has a different function. In our view, its purpose is not to permit a summary proceeding to be delayed by litigation of a non-enemy's claim to an interest in the property demanded, but rather to insure that the security interests to which it refers would be fully protected in an appropriate proceeding for return.

Section 8(a) provides in relevant part:

> any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand * * * may continue to hold said property, and, after default, may dispose of the property in accordance with law * * *.

As originally introduced in Congress, the section was intended simply to provide that "American citizens holding security on enemy property may dispose of such security on notice, presentation, or demand served by him on the Alien Property Custodian, with the same force and effect as if duly

served on the enemy personally." See H. Rep. No. 85, 65th Cong., 1st Sess., p. 3; S. Rep. No. 113, 65th Cong., 1st Sess., p. 8. It was thus intended merely to enable security holders to perfect their rights, despite the inaccessibility of enemy mortgagors and the like, by permitting substituted service on the Custodian of the requisite notice or presentation or demand. It appears to have been amended to its present form at the instigation of the New York Stock Transfer Association, which feared that otherwise the Act might be open to a construction permitting the permanent destruction by the Custodian of possessory rights of American security holders. *Hearings before Subcommittee on Commerce, United States Senate*, 65th Cong., 1st Sess., on H.R. 4960, p. 59. While the drafters of the bill, represented by Assistant Attorney General Warren, did not believe that the Act was in any case open to such construction and stated that the amendment did "not affect the bill in any way," they had no objection to such clarification. *Id.* at p. 160.

In brief, Section 8(a) was designed not to protect lienors from the temporary dispossession to which all property holders are subject, but to insure that an American holder of a possessory lien might, in a suit under Section 9(a), recover not merely the value of his equity in the property, but actual possession of the whole of the property subject to his lien. This result might follow from Section 9(a) alone, since it may well be argued that the phrase,

"any interest, right or title," there used to indicate what may be recovered, comprehends a security holder's right to possession. In view, however, of the general doctrine that a possessory lien does not survive surrender of possession (*Restatement, Security*, Sections 11, 80; Jones, *Pledges and Collateral Securities* (2d ed. 1901) Sections 23, 34, 40), it might have been maintained with some plausibility that upon surrender to the Custodian of property in which the holder had a possessory interest, the right to possession and the lien itself would have been lost beyond recovery by suit under Section 9(a), the claimant being reduced to the position of an unsecured creditor. Section 8(a) expressly confirms the right of a stated category of lienholders to recover such possessory rights as they may have had prior to seizure by the Custodian. There is no reason, however, to find in Section 8(a) any more far-reaching purpose, particularly one in conflict with the principle of summary capture which is basic to the efficient administration of the Act.

Any seeming inconsistency between the purpose of Section 8(a) as stated above and the text of the section is resolved when consideration is given to the character of the Custodian's determinations for purposes of a summary proceeding to enforce his demand. We have pointed out (*supra*, p. 10) that in such a proceeding "the determination of the Custodian is conclusive whether right or wrong."

Commercial Trust Co. v. Miller, supra, 262 U. S. at p. 53. The Custodian has determined in his vesting order and in his turnover directive that the debt here demanded was owing to an enemy and that there were no valid counterclaims or offsets to that debt. These findings, by implication, if not expressly, preclude the existence of the claimed security interests. If these findings are given the effect which the Act requires, the Bank cannot be regarded, in this action, as a person holding any type of security interest in the vested indebtedness. Accordingly, it cannot for present purposes be regarded as having any rights under Section 8(a). Any claim which it may make to rights under that section, like any other contention that the Custodian's findings were erroneous, can be fully considered in an appropriate proceeding for return. In such a proceeding, any possessory rights of the Bank under Section 8(a) or otherwise can be fully protected.

A contrary result would create a strange anomaly in the Act. It is settled that an American owner of property vested by the Custodian must surrender to the Custodian's determination of enemy ownership and must give up the property on demand, even if that determination is wrong. It would be strange, indeed, if the holder of a mere security interest, who has no title and only a conditional right of possession, should be given a privilege which is denied to an outright owner. Moreover, the allowance of such a privilege would seriously

impair one of the basic purposes of the Act, which is to permit a summary and speedy reduction to possession of vested property; for if any such defense to a summary proceeding is allowed, the Custodian may be subjected to innumerable vexatious delays caused by the assertion of even frivolous claims to the protection of Section 8(a). From what has been said, we think it clear that Section 8(a) is given a rational explanation, consistent with both its text and the basic scheme of the Act, if it is held to protect holders of various security interests from being placed in a worse position than other owners of interests in vested property. To construe it as discriminating in favor of pledgees, lienors and the like by conferring on them a privilege which is denied to an absolute owner would be gratuitously to attribute to Congress an extreme capriciousness.

Not only does the Bank's construction of Section 8(a) attribute to Congress a degree of solicitude for security interest holders which is without rational basis and which, indeed, goes far beyond the degree of protection which the representatives of those interests sought before Congress, but that construction is without support in any judicial holding. It is true that there are dicta in unreported opinions of Judge Augustus N. Hand which seem to indicate that lienors within the scope of Section 8(a) might be entitled to resist the Custo-

dian's demand.[22] But it is highly significant that the only cases which we have been able to find in which rights under Section 8(a) were recognized were suits under Section 9(a) for the return of property of which the Custodian already had possession. *Mayer* v. *Garvan*, 278 Fed. 27 (C.A. 1); *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656 (S.D. N.Y.), affirmed, *sub nom. Standard Oil Co.* v. *Clark*, 163 F. 2d 917 (C.A. 2), certiorari denied, 333 U. S. 873).[23] As Judge Anderson (dissenting on other grounds) said in *Mayer* v. *Garvan, supra*, 278 Fed. at pp. 35-36:

> At the outset it should be held clearly in mind that the case before us does not involve the right of the Custodian to seize the property in question. It involves only his right to retain it, or, as the case now stands, to retake a portion of it after accounting by the plaintiff.

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[22] See e.g., *Garvan* v. *$50,000 Bonds* (S.D.N.Y.), July 29, 1919, affirmed, *sub nom. Garvan* v. *$20,000 Bonds*, 265 Fed. 477 (C.A. 2), affirmed, *sub nom. Central Union Trust Co.* v. *Garvan*, 254 U. S. 554 (Record on Appeal, No. 394, October Term, 1920, pp. 82-83). Summary transfer of possession was ordered in that case, nevertheless, on the ground that the lien there claimed was not a possessory lien of the nature contemplated by Section 8(a). The Court of Appeals and this Court simply ignored the contention.

In *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 797 (C.A. 2), Judge Learned Hand assumed, *arguendo*, that the section might afford to an American pledgee a defense to a summary proceeding, but held that it could not be availed of by a pledgee who was a foreign national. This Court affirmed that holding without mention of the possible scope of the rights afforded to an American pledgee. *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 478-479.

[23] On appeal in the *Standard Oil* case, however, the Court of Appeals held that the alleged lien did not in fact exist. *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 927-928 (C.A. 2).

> This anomalous and somewhat confusing situation—of a right to seize what may not be lawfully retained—arises out of the necessities of war. It is expressly contemplated by the act. Compare *Central Trust Co.* v. *Garvan* * * * where, for the purposes of immediate possession, the determination of the Custodian was held conclusive "whether right or wrong." In some cases, including the opinion of the court below, are expressions as to the Custodian's right to seize, when what is really meant is the Custodian's right to retain. It is solely with the right to retain, or condemn as alien enemy property, that this case is concerned. The seizure by the Custodian neither made, destroyed, nor affected any rights now in question.

B. *The So-called "Banker's Lien" Here Asserted Is Not Within the Scope of Section 8(a)*

In any event, however, the Bank has not brought itself within the scope of Section 8(a). That section applies only to a carefully circumscribed class of security interests—mortgages, pledges, liens, or other rights "in the nature of security in property of an enemy" which "may be disposed of on notice or presentation or demand."

The court below held that the right here asserted does not come within that class of security interest. It stated (R. 22-23):

> In our opinion the Bank's right of set-off is not a "lien or other right in the nature of security in property of an enemy," within the meaning of the statutory language. Although

sometimes referred to as a "banker's lien," the right of set-off is not technically a lien, and certainly not a lien in property of an enemy, for the deposit of money in a bank passes title to the money and creates the ordinary debtor-creditor relationship. A creditor has no possessory lien on the general assets of his debtor. The reference in § 8 to "property *** which, by law or by the terms of the instrument ***, may be disposed of on notice or presentation or demand," makes it quite plain, we think, that the security interests protected are those in specific property which may have been hypothecated by pledge, mortgage, etc., or otherwise subjected to a possessory lien, but does not cover property constituting the general assets of a debtor against which the enemy asserts only a claim as a creditor.

In so holding, we believe the court was clearly right. If Section 8(a) is to be construed as constituting an anomalous exception to the statutory scheme, and as permitting one who asserts rights under it to delay the Custodian's reduction of vested interests to possession by litigation as to the existence of the asserted non-enemy rights, it seems obvious that the coverage of the section should not be expanded beyond its terms.[24]

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[24] See the decision of Judge Augustus Hand in *Garvan* v. *$50,000 Bonds*, cited *supra*, note:

> The effect of my decision is to hold that the statute gives the right to the Alien Property Custodian to obtain possession of enemy owned property irrespective of the existence of liens thereupon unless such liens may be disposed of on notice or presentation or demand. In enacting

Here the Bank does not assert a true lien at all. It asserts merely a right of setoff which it seeks to describe by the term "banker's lien." Such a right of setoff clearly fails to come within Section 8(a). It is not a right "in the nature of security in property of an enemy." The relationship between Manufacturers Trust Company and the Deutsche Reichsbank is purely a debtor-creditor relationship induced as the result of a general deposit. *Bank* v. *Lanier*, 11 Wall. 369, 375; *Scammon* v. *Kimball*, 92 U. S. 362, 370; *New York County Bank* v. *Massey*, 192 U. S. 138, 145; *Burton* v. *United States*, 196 U. S. 283, 301. As the Court said in *New York County Bank* v. *Massey*, "the money deposited * * * creates an ordinary debt, not a privilege or right of a fiduciary character" (p. 145). This conclusion was emphasized when the court went on to say that a deposit of money "is not a transfer of property as a payment, pledge, mortgage, gift or security" (p. 147). From the time of the deposit it is no longer property of the depositor, but "becomes a part of the general fund of the bank." *New York County Bank* v. *Massey*, *supra*, at p. 145;

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this statute under the War Power Congress doubtless realized the fact that much enemy owned property was subject to possessory liens of various kinds and that the Act would be quite ineffective if third persons, in many cases business associates of the enemy aliens, could indefinitely hold their property or compel a trial on the merits, before transfer of possession could be awarded. Consequently a right to retain possession was given only to those lienors whose business requirements naturally demanded it. [Record on Appeal in No. 394, October Term, 1920, p. 83.]

Burton v. *United States*, *supra*, at p. 297. Thus the claimed right of setoff would give the Bank at most a right to withhold payment of money which is the Bank's property; it involves no right "in the nature of security in property of an enemy."

Moreover, the statute further requires that the right in the nature of security in property be such that it can be disposed of on default of the underlying obligation. It is apparent, however, that a general deposit account lacks altogether the characteristic of disposability. To speak of the Bank as having a right to dispose of its own property on default of the debt, and hold the excess proceeds, if any, for the Custodian's account, is a manifest absurdity. The most that the Bank can do with such deposit funds in the event of default on a debt of the depositor to the Bank is, under particular circumstances (not here present, as is shown, *supra*, pp. 17-20), to setoff the amount of the deposit against the amount of the past due obligation. Such a right cannot possibly be regarded as a right to "dispose of" property of the enemy within the contemplation of Section 8(a).

The failure of the right of setoff to constitute a security right within the intendment of Section 8(a) is emphasized by comparing it with a true banker's lien which does possess the requisite elements of a security interest in property of another entitling the creditor to dispose of that property on default and would, accordingly, come within

the provisions of the section. Thus, a bank has a true lien

> * * * on the securities belonging to its customer and received from him in the regular course of his business for the balance due to the bank from such customer, provided that there is no contract, express or implied, or circumstances showing a particular mode of dealing inconsistent with it * * *.
>
> This lien should not be confused with a set-off though courts occasionally confound the two conceptions. It does not extend to the money left on deposit according to the customs and usages of banks. It is confined to securities and valuables which may be in the banker's possession as collaterals. [5 Zollman, *Banks and Banking* (Perm. Ed.) § 3051.] [25]

It is true that some courts have confounded the two types of interest by referring loosely to a right of setoff as a "banker's lien." E.g., *Gonsalves* v. *Bank of America*, 16 Cal. 2d 129, 105 P. 2d 118; *Falkland* v. *St. Nicholas National Bank of New*

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[25] See also *Irish* v. *Citizens' Trust Co.*, 163 Fed. 880, 892 (N.D.N.Y.); *Beaver Boards Cos.* v. *Imbrie & Co.*, 287 Fed. 158, 163 (N.D.Ga.); *Lowden* v. *Iowa-Des Moines Nat. Bank & Trust Co.*, 10 F. Supp. 430, 433 (S.D. Ia.), affirmed, 84 F. 2d 856 (C.A. 8), certiorari denied, 299 U. S. 584; *Fourth Nat. Bank of Chicago* v. *City Nat. Bank of Grand Rapids*, 68 Ill. 398, 402; *Furber* v. *Dane*, 203 Mass. 108, 117-118, 89 N.E. 227, 230; Note (1925) 38 Harv. L. Rev. 800; 5 Michie, *Banks and Banking* (Perm. Ed.) § 114; 1 Morse, *Banks and Banking* (Perm. Ed.) § 336.

York, 84 N. Y. 145, 149.[26] And it may be that for most practical purposes one is as useful a security device as the other. Cf. Note (1925) 38 Harv. L. Rev. 800, at pp. 800-801. But it is settled that in considering the application of a federal statute the terminology applied by state courts is not controlling. *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110, 114; *Helvering* v. *Clifford*, 309 U. S. 331, 334-335; *Commissioner* v. *Tower*, 327 U. S. 280, 287-288. Cf. *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 193-194. Whatever New York may call the right of setoff here asserted, it is plain that it does not constitute the kind of security interest to which Section 8(a) was intended to relate.

III

THE CUSTODIAN IS ENTITLED TO INTEREST, AT A REASONABLE RATE, ON THE SUM DEMANDED IN THE TURNOVER DIRECTIVE FROM THE DATE OF ITS SERVICE TO THE DATE OF COMPLIANCE WITH IT

From the foregoing, it is apparent that service on the Bank of the Custodian's turnover directive imposed on the Bank an unqualified duty of immediate compliance. The demand for possession made in that directive was intended to be "no less immediately effective than a taking with the strong

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[26] *Studley* v. *Boylston Bank*, 229 U. S. 523, on which the Bank relied in this connection (Bank's petition for writ of certiorari, p. 9), is not such a case. The distinction between a true banker's lien and a banker's right of setoff is there made explicit at p. 528.

hand" (*Central Union Trust Co.* v. *Garvan*, *supra*, at p. 568); its enforcement was not to be impeded by "the delays of private litigation" (*Silesian-American Corporation* v. *Markham*, *supra*, at p. 798). It is evident, then, that the Bank unreasonably detained a sum of money which the Trading With the Enemy Act obligated it to pay forthwith upon the Custodian's demand. Accordingly, the District Court held the Bank liable for interest by way of damages for the unlawful detention. The majority of the court below, however, reversed on this point, stating that it saw "no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment" (R. 23). The majority appears to have based its decision on the fact that the Trading With the Enemy Act "contains no provision for the payment of interest or any other penalty in the event of non-compliance with the Custodian's demand that enemy-owned property be turned over to him" (*Ibid.*). Judge Clark, dissenting, pointed out, however, that since the Bank "took upon itself the decision to detain the money without legal right, and had the use thereof during the period of detention, the usual rule of interest on illegally withheld payments should apply" (*Ibid.*).

What Judge Clark denominated as the "usual rule" has been clearly set out in a number of decisions of this Court. Those decisions, old and recent, have made it clear that little, if any, significance is to be given legislative silence in respect to the

granting or denial of interest. In numerous cases this Court and lower federal courts have awarded interest on obligations created by federal law, despite the absence of any statutory provision for such interest. Interest has been awarded not as a penalty, but for the reasons on which Judge Clark based his dissent here: to indemnify the United States for the wrongful withholding of money which it was entitled to possess and use, and to avoid the unjust enrichment of the person who wrongfully retained and used the money. E.g., *Billings* v. *United States*, 232 U. S. 261; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Maryland Casualty Co.* v. *United States*, 76 F. 2d 626 (C.A. 5). Closely apposite to the instant case is that of *Royal Indemnity Co.* v. *United States*, *supra*. In that case the United States brought suit to enforce a surety's liability conditioned on a taxpayer's payment of his tax with interest. The surety pointed out that the statute made no provision for interest and contended that the Government's delay in bringing the action excused payment of interest. Chief Justice Stone rejected these contentions, saying (313 U. S. at pp. 296-297):

> Here, responsibility for delay in payment rests quite as much upon the debtor, who is chargeable with knowledge of its own obligation and the breach of it, as upon the creditor. And in the meantime the debtor has had the use of the money, of which its default has deprived the creditor. Interest upon the principal sum from the date of default, at a fair

rate, is therefore an appropriate measure of damage for the delay in payment.

The principles followed by this Court were fully recapitulated in its recent opinion in *Rodgers* v. *United States*, 332 U. S. 371, 373:

> * * * the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. * * * For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. * * *
>
> As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained.

Thus, since a fine is imposed in a criminal case as a punishment or deterrent rather than for the financial advantage of the United States, criminal penalties do not bear interest. *Pierce* v. *United*

States, 255 U. S. 398, 405-406. The *Rodgers* case, *supra*, applied this principle to penalties imposed on noncooperators under the Agricultural Adjustment Act. On the other hand, failure to pay a tax when due is held to entitle the United States to interest. E.g., *Billings* v. *United States*, *supra*. Similarly, interest has been awarded in a suit to recover the amount of advance payments from the surety of a defaulting contractor (*United States* v. *U. S. Fidelity Co.*, 236 U. S. 512), and in a suit to recover the value of lands with which the United States was induced to part through the defendant's fraud (*Jones* v. *United States*, 258 U. S. 40).

The precise question here at issue was decided contrary to the majority decision below by the Court of Appeals for the Third Circuit, in *Clark* v. *E. J. Lavino & Co.*, *supra*, which allowed the Custodian's claim for interest from the date of service of the turnover directive, despite respondent's claim of a right of setoff. That court, recognizing that the circumstances of its case were "analogous" to those of the instant case (Motion, *supra*, at p. 10),[27] expressly approved the dissenting opinion of Judge Clark. After a review of the pertinent cases the court made the following analysis (Motion, *supra*, at pp. 11-13):

> The Act creates the obligation to turn over on demand the property of the alien, not only to

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[27] The Bank contends, however, that the instant case and the *Lavino* case are not "analogous" because in the latter case "the non-compliance was not based on substantial or reasonable grounds, hence the award of interest was proper,"

> keep such property from being used for the benefit of the enemy but also to "affirmatively compel the use and application of foreign property" in "the interest of and for the benefit of the United States." See H.R. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2-3; 55 Stat. 839, 50 U.S.C. App. 5(b)(1).
>
> When the Custodian served his turnover directive upon Lavino the latter had an immediate duty to comply. The statute requires an immediate transfer of the property to the Custodian without resort to the courts by the holders of the property.
>
> * * * [A denial of interest] would place a premium upon disobedience to the mandate of the statute and reward the recalcitrant.

We believe that the Court of Appeals for the Third Circuit in the *Lavino* case, and the dissenting

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whereas the refusal to grant interest in the present case was "a proper exercise of discretion" because "the refusal was based on meritorious grounds." Bank's Petition for Rehearing, page 3. There are two short answers to this alleged basis of distinction. In the first place, the opinion in *Lavino* clearly shows that the court rested its decision on the overall equities and not on the merit or demerit of the reasons for refusal to pay. The court there called attention to the fact that, upon service of the turnover directive, "the statute requires an immediate transfer of the property to the Custodian without resort to the courts by the holders of the property," and that "to hold otherwise would place a premium upon disobedience * * * and reward the recalcitrant." Motion, *supra*, at p. 13. In the second place, it is difficult to see that the Bank's grounds for refusal to pay were more "meritorious" than Lavino's. If any comparison is to be drawn, it would probably favor Lavino, which at least asserted its claim before vesting, whereas the Bank sought to "correct" its own "erroneous" report only after vesting, more than four years later. See pp. 17-18, *supra*.

judge below, correctly interpreted and applied the standards laid down by this Court as to the award of interest where Congress is silent. The obligation to turn over sums demanded by the Custodian is not, of course, imposed as a fine or penalty of any description. The statute creates the obligation, not only to keep the property from being used for the benefit of the enemy, but also to "affirmatively compel the use and application of foreign property" in "the interest of and for the benefit of the United States." H. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2-3; 55 Stat. 839, 50 U.S.C. App. § 5(b)(1); *Clarke* v. *E. J. Lavino & Co., Motion, supra,* at pp. 11-12. Indeed, the most recent amendment of the Act shows that this must be regarded as a major purpose of the statute, for it provides in substance that vested German and Japanese property shall not be returned to its former owners nor compensation paid to them, but that the net proceeds of such property shall be covered into the Treasury where they will be available for payment of certain claims of American citizens arising out of the war and for such other purposes as Congress may prescribe. Act of July 3, 1948, 62 Stat. 1246, 1247, 50 U.S.C. App., Supp. II, §§ 2011, 2012.[28] The obligation which the present suit was brought to enforce must, therefore, be regarded as one imposed for the "financial advantage" of the United States, within the rule stated in the *Rodgers* case.

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[28] For lucid exposition of the considerations underlying this legislative policy, see Rubin, *"Inviolability" of Enemy Private Property* (1945), 11 Law and Contemporary Problems 166.

The court below sought to distinguish the *Billings* case and other cases cited above (except *Lavino*, which had not then been decided) on the ground that they "involve taxes or advances where the right to the money was finally adjudicated" (R. 23). This distinction has no substance. In the tax cases,[29] as in this, Congress has decided that the public interest requires that the Government's receipt of money be not subject to the delay inherent in judicial proceedings—in other words, that the Government is entitled to possess and use the money in the period between its demand and final adjudication of the lawfulness of the exaction. See *Salamandra Ins. Co.* v. *New York Life Ins. & Trust Co.*, 254 Fed. 852, 860-861 (S.D.N.Y.).

Thus, in the tax cases as in this, the possibility that the Government may, after full adjudication, be held not entitled to keep the sums collected can affect neither the Government's right to possess and use such sums in the interim period, nor its corollary right to be compensated for deprivation of that right. *Maryland Casualty Co.* v. *United States*, *supra*, is particularly apposite. There the Government brought an action on a bond to secure payment of a tax deficiency, the condition of the bond being the taxpayer's payment of the "deficiency in the

[29] The right of the Government to collect its internal revenue by summary administrative proceedings has long been settled. *Phillips* v. *Commissioner*, 283 U. S. 589, 595. The Trading With the Enemy Act is, in fact, only one of a number of statutes which empower the Government to insist upon compliance with its orders prior to judicial review of their lawfulness. See *Yakus* v. *United States*, 321 U. S. 414, 442-3, and cases cited.

tax found due by the Commissioner." The surety defended the suit on the ground that the tax was not legally owing and had, in fact, been determined in bankruptcy proceedings not to be owing. The court recognized that the taxpayer might "after paying seek refund of anything he did not owe" or that the surety might, after paying, be so subrogated to the taxpayer's rights as to be entitled to ask refund of any unlawful exaction. 76 F. 2d at p. 627. But the court treated the ultimate correctness of the Commissioner's determination as immaterial to the right of the United States to interest as compensation for the unjust withholding of money which the United States was entitled at least temporarily to possess and use. "The object of the bond was to assure prompt payment * * * of the taxes claimed by the Commissioner; not then to start a lawsuit about them." *Ibid.* The court assessed interest against the surety, at the legal rate, from the date of notice and demand upon it. There is no reason to suppose that the result would have been different if the taxpayer had not, by posting bond, transferred his responsibility to the surety, for the taxpayer's statutory obligation to pay would have been quite as absolute as the surety's contractual obligation.

If the Custodian should be denied interest when there is delay in complying with his money demands, the effectiveness of the summary powers which Congress has conferred on the Custodian would be materially impaired. As in the tax cases, a principal purpose of the summary procedure au-

thorized by Congress and approved by the courts, is the prevention of delaying litigation designed simply to postpone as long as possible the loss of use of such money. In practice, if there is to be assurance of an "immediate transfer * * * without resort to the courts" (*Clark* v. *E. J. Lavino & Co.*, Motion, *supra*, at p. 12), delay in compliance must be rendered unprofitable. This can be achieved only by the award of interest. Otherwise, even though persons required to pay relatively small sums of money might not choose litigious delay, those on whom large demands are served would find it profitable to delay payment as long as possible for the continued interest-free use of the money. Thus, not only would the Custodian be hampered in the exercise of his powers, but the practical working of the statute would produce inequities between individuals based solely on the quantity of money at stake.

The statement by the court below that the Custodian can obtain an order directing compliance "without delay" (R. 23) is unfortunately not accurate. It would be illusory to hope for speedy adjudication of such matters in view of the notoriously overcrowded condition of most federal dockets. In the instant case, some seven weeks elapsed between the filing of the Custodian's petition and the entry of the order, while in the *Lavino* case the corresponding period was 8½ months. Moreover, the administrative burden of the Custodian and the cost to the Government would be greatly increased if every demand for possession must be litigated.

In brief, the purpose of Congress to preclude dilatory tactics on the part of holders of enemy property can be fully effectuated only if such tactics are made unprofitable; and they will remain profitable if the recalcitrant is held immune from the ordinary requirement that he pay a fair rate of interest for the period during which, without legal right, he detains the property. Congress assuredly did not create the summary procedure for obtaining property with the intention that flouting of that procedure should result in the enrichment (through interest-free use of the property involved) of the person flouting it. See *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 568-569.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the cause remanded with directions to reinstate the judgment of the District Court.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General,
DAVID L. BAZELON,
Assistant Attorney General,
JOSEPH W. BISHOP, JR.,
Special Assistant to the Attorney General,
JAMES L. MORRISSON,
ROBERT B. MCKAY,
Attorneys.

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APPENDIX

Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U.S.C. App. 1-31):

SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839]:

* * * * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time

by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * * * *

SEC. 7 [as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020]:

* * * * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; * * *

SEC. 8. (a) That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: *Provided,* That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: *Provided further,* That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of

that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

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